

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued By:
Mark Lemle Amsterdam

77-1427

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES,

Appellee,

-v-

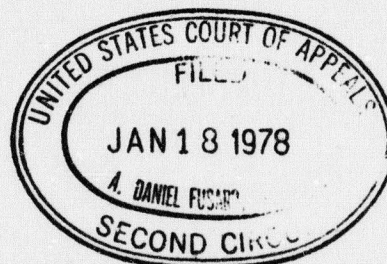
SAMUEL GLOVER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT
+ APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DOCKET NO. 77-1427

UNITED STATES,

Appellee,

-v-

SAMUEL GLOVER,

Defendant-Appellant.

BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Defendant-Appellant, SAMUEL GLOVER, submits this brief in support of his appeal from a judgment of conviction of Conspiracy to Distribute and of Possession With Intent to Distribute Controlled Substances (Methamphetamine Hydrochloride) and from the sentence imposed thereon, entered September 16, 1977 in the Southern District of New York.

STATEMENT OF THE CASE

On July 25, 1977, appellant was found guilty after a trial before Hon. Charles M. Metzner and a jury, of one count of conspiracy to distribute controlled substances and one substantive count of possession with intent to distribute a controlled substance. On September 16, 1977 appellant was sentenced to a term of imprisonment of one and one-half years on count one to be followed by three year's special parole. The imposition of sentence on Count 2 was suspended and the appellant placed on probation for three years to commence upon his release from incarceration on Count 1. The appellant is presently serving this sentence.

ISSUES PRESENTED FOR REVIEW

1. WHETHER APPELLANT'S RIGHTS TO DUE PROCESS WERE VIOLATED BY THE INTENTIONAL SUPPRESSION OF EXCULPATORY MATERIALS?
2. WHETHER APPELLANT'S SENTENCE MUST BE VACATED AS A RESULT OF FALSE AND DAMAGING INFORMATION BEING GIVEN TO THE DISTRICT JUDGE BY THE GOVERNMENT WITHOUT THE KNOWLEDGE OF THE DEFENDANT?

STATEMENT OF FACTS

The facts of the multi-defendant case as they relate to Appellant are as follows:

On December 30, 1976, Jody Lewis, an informant for the Drug Enforcement Administration entered the apartment of co-defendant Harold Epstein in the company of John Connerton, another alleged co-conspirator.* The purpose of the visit was to purchase methamphetamine ("speed") which transaction had been previously arranged.

Lewis testified that Appellant opened the door of Epstein's apartment to let Lewis and Connerton in and that Connerton introduced Glover to Lewis. The three men then sat down in the living room and conversed generally for a few minutes. (T. 144) After a few minutes Connerton went into a back room and stayed approximately ten minutes. (T. 145) When Connerton returned, he had possession of half the agreed upon amount of speed which was then tested by Lewis and found to be acceptable. Connerton then counted out \$2,600.00 in

* Epstein went to trial with appellant and was found guilty. Connerton became a fugitive.

small bills in the presence of Lewis and the appellant. Lewis then testified that after Connerton counted the money, the appellant counted it again. (T. 147)

Lewis and Connerton then returned to their van in which a D.E.A. Agent was located and shortly returned to the apartment where the same procedure again occurred. Lewis and the appellant sat in the living room while Connerton went into a back room, brought out the drugs, and counted the money. Lewis testified that once again, after Connerton counted the money (\$2,700), the appellant also counted it. (T. 149-150)

Other than exchanging amenities while Lewis and appellant were alone or even while Connerton was present, Appellant said nothing about drugs. (T. 147)

In addition to the above-stated evidence the government introduced a tape recording made after the December 30 transaction in which alleged co-conspirator Connerton stated to an undercover agent that appellant was Epstein's "alter ego" and that his role was to take the money.

However, there was a continuous pattern in Connerton's taped statements and post arrest statements suggesting that Connerton was trying to hide Epstein's identity by making a fall guy of the appellant. To that end Connerton repeatedly said that the black man (Glover) present in the apartment on December 30 was Epstein and that it was the black man who was

the true dealer. (See, e.g., T. 650) Connerton also made other statements which were clearly false. (See, e.g., T. 374-376)

Despite Connerton's post December 30 statement that Glover always takes the money, appellant was not present at any other transaction covered in the indictment.

The final piece of evidence used by the government to support their theory that appellant's role was one of being the "front man" was testimony of DEA agent Vigna that both times Lewis and Connerton left Epstein's apartment on December 30, 1976 a black man was seen coming out of the building, looking in the direction Connerton and Lewis had left, and then reentering the building. (T. 478, 482) While Vigna did not then know this individual, he was able to identify appellant after seeing him again four months later at the time of appellant's arrest. (T. 644)

ARGUMENT

POINT I

THE GOVERNMENT'S INTENTIONAL SUPPRESSION OF EXCULPATORY MATERIALS REQUIRES A REVERSAL OF THE CONVICTION

After the jury started its deliberations but prior to returning with a verdict, appellant's counsel learned that

co-defendant John McGuinness, who had pleaded guilty on the first day of trial, had informed the prosecutor that Jody Lewis, the informer, had purchased speed from McGuinness around the time that Lewis had started cooperating with the DEA. (T. 783-784) McGuinness also told the prosecutor that there were witnesses to these transactions. Furthermore, Lewis was apparently buying the drugs for his own account since he did not inform DEA of these transactions. This information was given to the prosecutor prior to Lewis taking the stand.

The significance of this evidence is readily apparent. Lewis on the stand denied ever purchasing or dealing in speed or even knowing anything about it. (T. 197) Most importantly, an informer's self-dealing while working for DEA would obviously aid in the effort to impeach his credibility; an effort which was particularly important since it was the informer's testimony about appellant's counting the money which was the primary evidence against him.

The evidence was so significant that the government conceded its importance (T. 785) but stated that a conscious, intentional decision had been reached not to reveal this information to the defense. (T. 789) The government's stated rationale for withholding the evidence was that after McGuinness gave this information, a review was made of the many tapes and

hundreds of pages of other discovery material given to defense counsel. In these materials was a conversation between the informer and McGuinness in which McGuinness says "you copped from me before". Lewis does not respond. (Govt. Ex. 26) Armed with the knowledge gained from McGuinness, the prosecutor could see that reference was made to what McGuinness was now telling him. Therefore, the government decided not to say anything further. (T. 789)

However, it must be obvious that the tape recording did not have the clear import the government suggested it had. Lewis had testified that he previously dealt in cocaine and the tape reference could have been to such a deal. Furthermore, there was nothing at all to suggest that Lewis withheld this information from the DEA.

The trial judge, in denying the motion for a mistrial (which became a motion to set aside the verdict as the argument on the point continued after the jury returned), stated that Lewis' denial on the stand that he ever dealt with McGuinness (T. 180) coupled with McGuinness' taped remarks with no denial by Lewis should have triggered further cross-examination about their dealings.

The district judge's remarks, however, fail to grasp that the real significance of the information was that Lewis never told his DEA supervisors about his dealings. In the absence of this particular knowledge, there was no interest in cross-examining Lewis about the details of a past cocaine deal even if Lewis now denied it.

In short, there was no way of knowing the full significance of the brief excerpt of the tape nor any reason that the excerpt would trigger the full information. In fact, with Lewis denying it on the stand, there would be no way of learning that there were independent witnesses to the transactions. Thus, the government clearly had the obligation to disclose this information to the defense.

In addition to the McGuiness information about the informer, the government intentionally withheld other significant material.

In a Sentencing Memorandum filed by the government in regard to co-defendant Epstein, the government acknowledges that Epstein had certain individuals which he used as front men and that these names were known to the government.*

* A copy of this sentencing memorandum was not given to Appellant's counsel who learned of its existence only when docketing the record for this appeal.

The government was fully aware that appellant was maintaining that his presence in the apartment was innocent of any criminal wrongdoing and that he was not acting as a front man nor had he done so in the past. And while the defense was emphasizing that other deals were occurring without appellant's participation, the government was intentionally withholding evidence which would have supported the defense. In an amazing atavism to pre-Brady days, the government sat on evidence which directly would have benefited the appellant and which may have led to other exculpatory evidence.

There can be no excuse for the government's conduct in this case. The "sporting event" aspect of a criminal trial was a prime target of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. See, e.g., United States v. Fernandez, 506 F. 2d 1200 (2d Cir. 1974); United States v. Seijo, 514 F. 2d 1357 (2d Cir. 1975); United States v. Polisi, 416 F. 2d 573 (2d Cir. 1969). Unlike the inadvertant suppression in Seijo, the government here, in regard to separate, distinct areas intentionally chose to suppress material and concededly beneficial evidence.

Where the evidence of guilt is as slight as in the instant case and where the government itself acknowledges the limited role played by the appellant if the prosecution's evidence is believed, (T. 743), any doubts as to the effect of the suppressed materials must be resolved in favor of the appellant. Cf. United States v. Fried, 486 F. 2d 201 (2d Cir. 1973), cert. denied, 416 U.S. 983 (1974) Where the government concedes the significance of the information (T. 785), the government's conduct in suppressing the evidence must be given the closest scrutiny. The conduct of the prosecution in this case cannot survive such scrutiny.

POINT II
THE GOVERNMENT'S SUBMISSION OF FALSE AND
DAMAGING INFORMATION TO THE DISTRICT JUDGE
MANDATES THAT APPELLANT'S SENTENCE BE
VACATED WHERE SUCH SUBMISSION WAS NOT MADE
KNOWN TO THE APPELLANT OR HIS COUNSEL

As noted in Point I, supra, the government, unbeknownst to the appellant, submitted a sentencing memorandum to the district judge. Since the memorandum was directed to the co-defendant's sentence, the government apparently decided not to send a copy to appellant's counsel. However, in the memorandum the government speaks about the appellant saying that Glover was used by Epstein to "deliver and collect money from drug dealers" (Memorandum pp. 4-5) The government then went on to state:

In fact, Glover was convicted in this case based on his acting as Epstein's 'front man' and other evidence confirmed his role as an enforcer for Epstein.

(Id. p. 5) (emphasis added)

The "other evidence" referred to by the government is obviously evidence other than that which was presented to the court during the trial of this case.

It barely needs saying that allegations of the sort made in the government's memorandum cannot be transmitted to a sentencing judge in the absence of an opportunity by the defendant to rebut them.

While it is generally true that a Court of Appeals will not review sentences; see, e.g., Gore v. United States, 357 U.S. 386 (1958), it is also true that review is available "to insure that the trial judge has based his decision on reliable information" United States v. Daniels, 446 F. 2d 967, 970 (6th Cir. 1971) citing Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948). See also United States v. Herndon, 525 F. 2d 208 (2nd Cir. 1975); United States v. Needles, 472 F. 2d 652, 657 (2d Cir. 1973).

Indeed, this Court has several times held that a sentence imposed as a result of possible misapprehension as to certain material facts coupled with a denial of an opportunity to be heard may amount to a denial of due process. United States v. Stein, 544 F. 2d 96 (2d Cir. 1976). Quoting from Townsend v. Burke, supra, the Court stated:

it is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement

of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. Townsend v. Burke, 334 U.S. 736 at 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690 (1948).

See also, United States v. Robin, 545 F. 2d 775 (2d Cir. 1976); United States v. Malcolm, 432 F. 2d 809, 815 (2d Cir. 1970)

Thus, the government's remarks could not remain unchallenged and the appellant should clearly have been given an opportunity to rebut the allegations whether by documents, oral statements or an evidentiary hearing.

United States v. Robin, supra, 545 F. 2d at 779.

In the instant case, the trial judge made no mention of the government's memorandum regarding Epstein, in part, no doubt, because Epstein became a fugitive prior to the sentencing date. Thus, there is no indication in the record whether the judge ever read the memorandum or the passages about the appellant. But since the judge had not been informed prior to the day of sentence that Epstein had fled, it is likely that the judge read the memorandum. There is no indication whether the trial judge considered the information about appellant since the only factors mentioned on the record

are the Appellant's employment record and his previous convictions. However, the uncertainty in this regard cannot be permitted to stand. Furthermore, the eighteen month sentence for a first-time drug offender, even with appellant's background (S. 9-10), is a fairly lengthy sentence, especially since the drug involved was methamphetamine, not heroin.

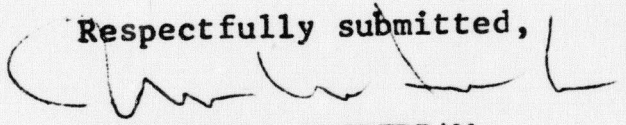
In short, the "court's failure to take appropriate steps to ensure the fairness and accuracy of the sentencing process must be held to be plain error..." United States v. Robin, supra, 545 F. 2d at 779

For these reasons , the sentence must be vacated and the matter remanded.

CONCLUSION

In the interests of justice and based firmly on the above-cited precedents, it is respectfully requested that the Court reverse the Appellant's conviction and sentence.

Respectfully submitted,


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APPENDIX

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DOCKET ENTRIES.....A1

INDICTMENT.....A4

CHARGE TO THE JURY.....A9

5-31-77 Filed appearance bond in the amount of \$2,000 receipt # 088473 dated 5-27-77

6-1-77 Filed Govt's memorandum of law in response to Deft's pre-trial motions

6-1-77 Filed REMAND -Deft released from custody of U.S. Marshal Pool posted as directed by the Court

6-9-77 Filed Memo-endorsed on Motion dated 5-23-77- This motion is marked withdrawn purs. to counsel's letter dated 6-3-77...So Ordered. Metzner,J. m/n.

6-9-77 Filed Memo-endorsed on Motion dated 5-23-77- The motion is disposed as follows. No.1 is granted as to overt acts specified in the indictment., Nos.2(a) and (b) are denied. No.3 is granted unless gov't submits an affidavit. for in camera inspection by June 14, 1977 in support of its position that it should not be required to disclose such information. Nos. 4 and 5 are denied. Nos. 6, 7 & 8 are denied except as covered by 18 USC 3500 and Brady. Nos.9 & 10 are denied. No. 11 is granted to the extent consented to by the gov't. etc.....So Ordered. Metzner,J. m/n

6-20-77 Filed Mag. final commitment dated 5-5-77

7-15-77 Filed Govt's voir dire

7-15-77 Filed Govt's requests to charge

7-18-77 Filed Transcript of record of proceedings, dated MAY 27, 1977

7-18-77 TRIal begun.....METZNER,J.

7-19-77 TRIal continued.....METZNER,J.

7-20-77 " "METZNER,J.

7-21-77 " " METZNER,J.

7-22-77 " " METZNER,J.

7-25-77 TRIal continued Juror #2 is removed & replaced by alternate # 1 Mrs. Mary McCarthy TRIal concluded DEft GUILTY on each of counts 1 & 2 PSI ordered Sentence Sept. 16, 1977 Bail continued...METZNER,J.

8-24-77 Filed Transcript of record of proceedings, dated July 19, 20, 21, 22

9-16-77 Filed JUDGMENT & COMMITMENT DEft (atty present) The deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of One and a half (1½) years on count (1) Pursuant to the provisions of Section 841 of Title 21 USC the deft is placed on SPECIAL PAROLE of THREE (3) YEARS to commence upon expiration of confinement. Imposition of sentence on count (2) is suspended and the deft is placed on probation for a period of THREE (3) YEARS to commence upon release from incarceration on count (1)....METZNER,J. Copies issued

9-20-77 Filed commitment & entered return, DEft delivered to WARDEN M.C.C., N.Y.C. ON 9-16-77

-co ntinued on pg 3)

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C D NUMBER	DATE	RECEIPT NUMBER	C D NUMBER

V. EXCLUDABLE DEI

(a) (b) (c)

DATE

PROCEEDINGS (continued)

(Document No.)

9-23-77

Filed notice of appeal from the Judgment of conviction entered on the 16th day of Sept. 1977 (notice mailed to Govt's atty & (US Atty)

C

UNITED STATES OF AMERICA,

-v-

INDICTMENT

77 Cr. 202

*noty
appended* → HAROLD EPSTEIN, a/k/a Eppy,
a/k/a Harold, a/k/a Allen Hertz,
SAMUEL GLOVER, a/k/a Sammy,
ROBERT DALY, a/k/a Bobby Daly,
JOHN CONNERTON and
JOHN MCGUINNISS

Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about the 16th day of November, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, SAMUEL GLOVER, a/k/a Sammy, ROBERT DALY, a/k/a Bobby Daly, JOHN CONNERTON and JOHN MCGUINNISS the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(B) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 29th day of December, 1976, JOHN CONNERTON and JOHN McGUIINISS, the defendants met an undercover agent and another individual in the vicinity of 526 East 211th Street New York, New York and discussed the sale of one quarter of a pound of methamphetamine.
2. On or about the 30th day of December, 1976, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, and SAMUEL GLOVER, a/k/a Sammy, the defendants were in Apartment 1B, 1214 First Avenue, New York, New York.
3. On or about the 30th day of December, 1976, JOHN CONNERTON, the defendant had a .38 caliber revolver in his possession.
4. On or about the 30th day of December, 1976, JOHN CONNERTON and JOHN McGUIINISS, the defendants, together with an undercover agent and another individual drove to the vicinity of 1214 First Avenue, New York, New York.
5. On or about the 30th day of December, 1976 JOHN CONNERTON, the defendant received from an undercover agent \$3,300 in officially advanced funds whose serial numbers had been recorded, counted the money and then returned it to the undercover agent.
6. On or about the 30th day of December, 1976, JOHN CONNERTON, the defendant, and another individual entered apartment 1B, 1214 First Avenue, New York, New York.

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7. On or about the 7th day of January, 1977, JOHN CONNERTON, the defendant met with an undercover agent at O'Neal's Saloon, 48 West 63rd Street, New York, New York, and discussed past and future purchases of methamphetamine.

8. On or about the 11th day of February, 1977, ROBERT DALY, a/k/a Bobby Daly and JOHN CONNERTON, the defendants, together with two undercover agents travelled to the vicinity of 1214 First Avenue, New York, New York.

9. On or about the 11th day of February 1977, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, the defendant, was in Apartment 1B, 1214 First Avenue, New York, New York.

10. On or about the 11th day of February, 1977, ROBERT DALY, a/k/a Bobby Daly, the defendant exited Apartment 1B, 1214 First Avenue, New York, New York.

11. On or about the 11th day of February, 1977, ROBERT DALY, a/k/a Bobby Daly, the defendant handed an undercover agent approximately two ounces of methamphetamine.

12. On or about the 11th day of February, 1977, ROBERT DALY, a/k/a Bobby Daly, and JOHN CONNERTON, the defendants received \$1700 and \$1000 respectively in officially advanced funds whose serial numbers were recorded.

13. On or about the 10th day of March, 1977, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, the defendant, had in his possession a twenty dollar federal reserve note whose serial number matched the officially advanced funds expended on December 30, 1976, referred to in Overt Act 5 listed above.

(Title 21, United States Code, Section 846).

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of December, 1976, in the Southern District of New York, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, SAMUEL CLOVER, a/k/a Samay, JOHN CONNERTON and JOHN McGUINNESS the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, 110.81 grams of methamphetamine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B) and Title 18, United States Code, Section 2).

COUNT THREE

The Grand Jury further charges:

On or about the 11th day of February, 1977 in the Southern District of New York, HAROLD EPSTEIN, a/k/a Eppy, a/k/a Harold, a/k/a Allen Hertz, ROBERT DALY, a/k/a Bobby Daly, and JOHN CONNERTON the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II controlled substance, to wit, 55.36 grams of methamphetamine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B) and Title 18, United States Code, Section 2.).

COUNT FOUR

The Grand Jury further charges:

On or about the 30th day of December, 1976, in the Southern District of New York, JOHN CONERTON, the defendant, unlawfully, wilfully and knowingly, did carry a firearm, to wit, a .38 caliber revolver, during the commission of a felony for which he may be prosecuted in a court of the United States, to wit, the felonies charged in Counts One and Two in this Indictment.

(Title 18, United States Code, Section 924(c)(2).)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

S V.
PSTEIN
CHARGE
METZNER

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THE COURT: Before I start the charge, Ms. Zimmerman, ladies and gentlemen of the jury, I want to tell you that Exhibits 24 and 25 are in evidence, the letters that were sent by Agent Vigna to the authorities in Rockland County.

We have now reached the point in this trial where you are about to enter upon your final function as jurors, which is, of course, one of the sacred duties of citizenship.

You have given careful attention to the evidence during the course of the trial, and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed, and with impartiality and fairness reach a just verdict in this case.

In our court system the functions of the Judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is. It is your duty to accept the law as I state it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses, and the weight and the effect and value that should be given to their testimony. It is up to you to determine from the evidence you have heard what the facts are in this case, and from

A9

2 those facts decide whether a defendant has violated the
3 law.

4 This is a criminal prosecution in which the
5 government is one party and the defendants are the others.
6 The fact that the government is a party entitles it to no
7 greater and to no lesser consideration than any other
8 party. It is entitled to the same consideration as given
9 to the defendants, no more and no less.

10 This case must be decided within the scope of
11 the charges against each defendant as contained in the
12 indictment. But before discussing the law applicable to
13 the charges of the indictment, let us consider some general
14 principles which apply to every criminal case.

15 An indictment is not evidence. It merely
16 describes the charges made against a defendant, and may not
17 be considered by you as evidence of the guilt of a
18 defendant. Nor can the fact that a grand jury has found
19 this indictment in any way detract from the presumption of
20 innocence with which the law surrounds a defendant unless
21 and until his guilt is proved beyond a reasonable doubt.

22 Each of the three counts which you will
23 consider allege the commission of a separate and distinct
24 offense. It will be necessary for you to reach a verdict
25 of guilty or not guilty as to each of the defendants

A10

1 md 3
2 separately on each of the counts of the indictment in which
3 he is named.

4 You must consider and weigh the evidence
5 separately a to each defendant named in each count.
6 The fact that you may find both or one of the defendants
7 guilty or not guilty of one of the offenses charged should
8 not control or influence your verdict with respect to any
9 other offense with which a defendant is charged or to a
10 charge against any other defendant.

11 This indictment charges in the first count
12 that Harold Epstein, Samuel Glover, John McGuinniss, Robert
13 Daly and John Connerton, conspired to violate the law.

14 In count 2 Epstein, Glover, Connerton and
15 McGuinniss are charged with an actual violation of the
16 law.

17 In the third count Epstein, Daly and Connerton
18 are charged with actual violation of the law.

19 I will give you a detailed charge on all of
20 these three counts a little later on.

21 As you well know, you are not determining the
22 guilt or innocence of Daly, McGuinniss or Connerton on this
23 trial, although you will be considering proof that relates
24 to these persons. You may not speculate as to why they are
25 not being tried, nor may you consider their absence in any

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1 md 4

2 way in determining the charges against Epstein and
3 Glover.

4 I should tell you that their absence is not
5 the fault of either the government or the defendants.

6 Each defendant has denied the charges in the
7 indictment. By his plea of not guilty each defendant has
8 put into issue every material fact alleged in the
9 accusation brought against him. Accordingly, the government
10 having made the charge has the burden of proving each
11 material element of each count of the indictment. This rule
12 applies to each defendant individually as to each of the
13 charges in the indictment in which he is named.

14 This burden of proof never shifts. It remains
15 with the government throughout the entire trial and during
16 your deliberations as jurors. A defendant does not have
17 to prove his innocence. He is presumed to be innocent,
18 and this presumption is overcome only when you reach a
19 conclusion from the evidence that his guilt has been
20 established beyond a reasonable doubt.

21 What is meant by reasonable doubt? There is
22 nothing mysterious about the term. It means, as the
23 words themselves indicate, a doubt based upon reason and
24 common sense which arises after consideration of all the
25 evidence.

A12

1 md 5

2 A reasonable doubt is a doubt which would cause
3 reasonable persons to hesitate to act in matters of
4 importance to themselves. It is not a vague, speculative,
5 imaginary something, and a person may not be convicted on
6 mere suspicion or conjecture.

7 On the other hand, a reasonable doubt does not
8 exist merely because a juror does not wish to perform an
9 unpleasant duty.

10 A reasonable doubt may arise not only from the
11 evidence produced but also from the lack of evidence.
12 A defendant may also rely upon evidence brought out on cross
13 examination of any of the witnesses who have testified on
14 behalf of the government. He may raise a reasonable doubt
15 in your mind as to the existence of one or more of the
16 essential elements of the crime without affirmatively
17 presenting his version of all or any of the facts.

18 This is so because the law does not impose upon
19 a defendant a duty to produce any evidence. The law does
20 not compei a defendant to take the witness stand and testify,
21 and no presumption of guilt may be raised, and no inference
22 of any kind may be drawn, from the failure of a defendant
23 to testify.

24 Now, it is not necessary for the government to
25 prove the guilt of a defendant beyond any possible doubt.

A13

1 md 6

2 Proof is usually not a matter of mathematical or absolute
3 certainty. In the nature of things it cannot be. But
4 to sustain a conviction there must be such proof as
5 satisfies your reason as intelligent people beyond any
6 reasonable doubt that the defendant is guilty as charged.

7 If you do not have a reasonable doubt of a
8 defendant's guilt as to the material elements of the charge
9 then you should return a verdict of guilty on that count.
10 If, on the other hand, you do have a reasonable doubt as
11 to a defendant's guilt as to any of the material elements
12 of the crime charged then you must return a verdict of not
13 guilty on that count.

14 This trial has been relatively short, and you
15 have heard the summations of counsel in which they pointed
16 out the various portions of the proof on which they say
17 you should rely to render a verdict in favor of their
18 client. I see no reason to further detail the contentions
19 of the parties or the specific proof to support those
20 contentions.

21 You will be considering three counts, a
22 conspiracy count and two substantive counts. Substantive
23 counts and conspiracy counts are governed by different legal
24 principles.

25 Generally speaking, a substantive count charges

AIX

violation of a law which contends specific conduct is illegal. For example, distributing or possessing narcotics with intent to distribute.

On the other in a conspiracy count the offense charges is an agreement or understanding of two or more persons to commit a violation of a particular substantive law.

Let us now turn to count 1, the conspiracy count. This count charges that from on or about November 16, 1976, up to and including March 18, 1977, the date of the filing of this indictment, Harold Epstein, also known as Eppie, or Allen Hertz, Samuel Glover, John McGuinniss, Robert Daly and John Connerton, unlawfully, knowingly and wilfully conspired to violate Section 841 (a) (1) of Title 21 of the United States Code, which makes it a crime for anyone knowingly and wilfully to distribute or possess with intent to distribute narcotic controlled substances.

Now, what is a conspiracy? It is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose, and one or more of the persons who are members of the conspiracy does any act to effect or further the object of the conspiracy.

It is a partnership in criminal purposes in

A15

md 8

which each member becomes the agent of any other member and is a crime in itself.

To prove a conspiracy here the evidence must show beyond a reasonable doubt the existence of each one of the following elements:

1. That the conspiracy described was formed and existing at or about the time alleged.

2. That it was part of the conspiracy that the conspirators would unlawfully, wilfully and knowingly distribute and possess with intent to distribute Schedule 2 narcotic drug controlled substances.

I should tell you that methamphetamine hydrochloride, the drug in question in this case, is a Schedule 2 controlled substance.

3. That the defendant knowingly and wilfully became a member of the conspiracy.

4. That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged.

5. That such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

Now, as to a formation of a conspiracy it is not necessary that there be proof that the participants

A16

1 md 9

2 met together and entered into a formal or written agree-
3 ment, or that they directly stated between themselves what
4 their object or purpose was to be, or the details of the
5 plans, or the means by which the purpose was to be
6 achieved.

7 Indeed, it would be extraordinary were the
8 members of a conspiracy to set forth all the actual details
9 of their arrangements in a formal and written agreement.
10 When persons in fact embark together on a criminal conspiracy
11 much is often unexpressed, much is left to unwritten
12 understanding. Generally, such a criminal conspiracy is
13 a matter of inference adduced from the acts and statements
14 of the alleged conspirators.

15 What the evidence must show in order to establish
16 that a conspiracy existed is that the members in some way
17 or other positively or tacitly came to a mutual understanding
18 to violate the law.

19 In this case it is claimed that the purpose of
20 the conspiracy was to distribute methamphetamine to
21 purchasers or to possess methamphetamine with the intent to
22 distribute it.

23 It is a violation of law to possess
24 methamphetamine with intent to distribute it, or to distribute
25 such substances. In determining whether or not there was

A17

1 md 10

2 such an unlawful agreement you may judge the acts and
3 conduct of each of the alleged co-conspirators as a whole,
4 and the reasonable inferences to be drawn from such
5 evidence.

6 If you satisfy yourself beyond a reasonable
7 doubt that a conspiracy existed as alleged in the indict-
8 ment, then you must determine whether a defendant knowingly
9 and wilfully was an active participatnt in the unlawful
10 plan with the intention of furthering its objectives.

11 Mere knowledge of an illegal act on the part of
12 some other alleged co-conspirator is not sufficient.
13 Merely acting in a way which incidentally furthers the
14 purpose of the conspiracy without knowledge that a conspiracy
15 exists does not make a person a member of the conspiracy.

16 You may find that the defendant acted knowingly
17 or wilfully if he acted voluntarily and purposely with
18 specific intent to do something which the law forbids.
19 That is to say that he must have acted with evil motive
20 or bad purpose to disobey or to disregard the law and not
21 because of negligence, mistake, inadvertence, or other
22 innocent reason.

23 It is obviously impossible to ascertain
24 directly what a person knew or intended. You cannot look
25 into a person's mind to see what his intentions were, or

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1 md 11

2 what he knew. But a careful and intelligent consideration
3 of the facts and circumstances shown by the evidence in any
4 given case as to a person's actions and statements enables
5 us to infer with a reasonable degree of certainty and
6 accuracy what his intentions were in doing or not doing
7 certain things and the state of his knowledge.

8 If a defendant on trial, or any other person
9 with knowledge of the specific object and purpose of a
10 plan, intentionally encourages, advised, or assists the scheme
11 for the purpose of furthering it, he thereby becomes a
12 knowing and wilful participant; he thereby becomes a
13 conspirator.

14 The guilt of a conspirator is not governed by
15 the extent of his participation. It is not required that
16 each of the conspirators participate in or have knowledge of
17 all of its operations. He need not know all of the
18 conspirators. He may join at any point in its progress
19 and be held responsible for all that may be or has been
20 done.

21 In determining whether or not a defendant was
22 a member of the conspiracy you may consider evidence of
23 his own acts, statements and conduct, as well as the evidence
24 of the acts, statements and conduct of other alleged
25 co-conspirators, and the reasonable inferences to be drawn

A19

1 md 12

2 from such evidence.

3 The indictment alleges that the conspiracy
4 commenced on or about November 16, 1976, and continued to
5 March 18, 1977, the date the indictment was filed.

6 The government is not required to prove that the alleged
7 conspiracy existed over the whole course of time set forth
8 in the indictment. It is sufficient if you find at any
9 time within that period that all of the elements of the
10 alleged conspiracy have been proven to your satisfaction
11 beyond a reasonable doubt.

12 The fact that the government may not prove
13 that the conspiracy was carried on as early or as long as
14 the indictment alleges is not of any importance so far as
15 the elements of the crime are concerned.

16 The next element that must be proved on this
17 issue of conspiracy is the requirement of an overt act.
18 You may not find a defendant guilty of conspiracy unless
19 you are convinced beyond a reasonable doubt that one of the
20 conspirators knowingly committed one of the overt acts
21 charged in the indictment.

22 The government need not prove the commission of
23 all of the overt acts charged in the indictment.

24 By the term overt act is meant any act knowingly
25 done by one of the conspirators in an effort to effect or

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1 md 13

2 accomplish some object or purpose of the conspiracy.

3 The overt act need not be criminal in nature
4 if considered separately and apart from the conspiracy.
5 It may be as innocent as the act of a man walking across
6 the street or using a telephone.

7 The overt acts referred to in the indictment
8 are:

9 No. 1: On or about the 29th day of December
10 1976 John Connerton and John McGuinniss met an undercover
11 agent and another individual in the vicinity of 526 West
12 211th Street, New York, New York, and discussed the sale
13 of one quarter of a pound of methamphetamine.

14 No. 2: On or about the 30th day of December
15 1976 Harold Epstein and Samuel Glover were in Apartment
16 1-B at 1214 First Avenue, New York.

17 No. 3: On or about the 30th day of December
18 1976 John Connerton and John McGuinniss together with an
19 undercover agent and another individual drove to the vicinity
20 of 1214 First Avenue, New York.

21 No. 4: On or about the 30th day of December
22 1976 John Connerton received from an undercover agent \$3300
23 in officially advanced funds whose serial numbers had been
24 recorded, counted the money, and then returned it to the
25 undercover agent.

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1 md 14

2 No. 5: On or about the 30th day of December
3 1976 John Connerton and another individual entered
4 Apartment 1-B, 1214 First Avenue, New York.

5 No. 6: On or about the 7th day of January
6 1977 John Connerton met with an undercover agent at
7 O'Neals Balloon, 48 West 63rd Street, New York, and dis-
8 cussed past and future purchases of methamphetamine.

9 No. 7: On or about February 11, 1977,
10 Robert Daly and John Connerton together with two undercover
11 agents traveled to the vicinity of 1214 First Avenue,
12 New York.

13 No. 8: On or about February 11, 1977, Harold
14 Epstein was in Apartment 1-B, 1214 First Avenue, New
15 York.

16 No. 9: On or about February 11, 1977, Robert
17 Daly left Apartment 1-B, 1214 First Avenue, New York.

18 No. 10: On or about February 11, 1977,
19 Robert Daily handed an undercover agent approximately two
20 ounces of methamphetamine.

21 No. 11: On or about February 11, 1977,
22 Robert Daly and John Connerton received \$1700 and \$1000
23 respectively in officially advanced funds whose serial
24 numbers were recorded.
25

A22

No. 12: That on or about March 15, 1977, Harold Epstein had in his possession a \$20 Federal Reserve Note whose serial number matched the officially advanced funds expended on December 30, 1976, referred to in overt act No. 4, which I have just read.

The fact that a particular defendant is not named in an overt act is of no importance because once you find a conspiracy existed and that a member on trial was a member of a conspiracy then he is bound by the acts done and the statements made by any other member in furtherance of that conspiracy even in the absence of such defendant.

Once you have determined that the offense has been established under the guidelines I have just given you, then the crime of conspiracy is complete as to every person found by you to have been knowingly and wilfully a member of the conspiracy.

Furthermore, at this point the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

Now, let us turn to the substantive counts of the indictment. Count 2 charges that Epstein, Glover, McGuinniss, and Connerton, on or about December 30, 1976, wilfully and knowingly distributed or possessed with intent to distribute 110 grams of methamphetamine hydrochloride.

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1 md 16

2 Count 3 charges Epstein, Daly and Connerton
3 on or about February 11, 1977, wilfully and knowingly
4 distributed or possessed with intent to distribute 55.36
5 grams of methamphetamine hydrochloride.

6 In order to find either of the defendants
7 guilty on Count 2, and Defendant Epstein guilty on Count 3,
8 you must find as to that count that each of the three
9 elements have been proved beyond a reasonable doubt:

10 First, that the substances marked in evidence are
11 in fact methamphetamine hydrochloride; second, that on or
12 about the date claimed in the count the defendant wilfully
13 and knowingly had possession of the methamphetamine charged
14 in the count; third, that the defendant knowingly and
15 wilfully distributed or possessed with intent to distribute
16 the methamphetamine to someone else.

17 Under the first element you must find beyond a
18 reasonable doubt that the substance referred to in this
19 count is in fact methamphetamine hydrochloride.

20 It has been stipulated that if the government's
21 chemist was called he would testify that the substances
22 introduced into evidence on counts 2 and 3 are methamphetamine
23 hydrochloride.

24 The second element which must be proved beyond
25 a reasonable doubt is that on or about the dates in question,

A24

December 30, 1976 in count 2, and February 11, 1977 in count 3, the defendant knowingly and wilfully had in his possession the methamphetamine charged in the count.

What I have said previously concerning the words "knowingly and wilfully" in discussing the conspiracy count applies equally as well here.

The word "possession" as used here means not only actual physical possession in the sense of holding an object in someone's hands or having it on one's person. A defendant may also be found to have possession of methamphetamine if you are convinced beyond a reasonable doubt that he had the power to control its movement, delivery and distribution, or fix its price, even though it was in the physical possession of another person. This is what the law terms constructive possession.

The third element which must be proved beyond a reasonable doubt is that a defendant wilfully and knowingly distributed or possessed with intent to distribute the methamphetamine in his possession to someone else.

Under this element the government must prove either that the defendant actually distributed the methamphetamine or that he possessed it with intent to distribute it.

The government need not prove both.

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1 md 18

2 This third element is satisfied if you find
3 that the defendant had a specific purpose to sell the
4 methamphetamine to someone else.

5 What I have said previously concerning the
6 words knowingly and wilfully and possession applies equally
7 as well here.

8 The guilt of a defendant on counts 2 and 3 may
9 be established without proof that he himself actually
10 did every act constituting the offense. This is so because
11 anyone who knowingly aids, abets, counsels, induces, or
12 procures the commission of a crime against the United
13 States is punishable as a principal.

14 In order for a defendant to aid or abet another
15 to commit a crime, it is necessary that he wilfully
16 associate himself in some way with the criminal venture,
17 knowing the essential elements of the offense as I have
18 outlined them to you, that he wilfully participate in it as
19 something that he wishes to bring about, that he wilfully
20 seek by some action of his to make it succeed.

21 Similarly, whatever a person is legally capable
22 of doing himself can be done through another as agent, and
23 thus if the accused wilfully causes an act to be done by another
24 person which is an offense against the United States, the
25 accused is punishable as a principal.

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2 Mere presence and guilty knowledge on the part
3 of a defendant that a crime is being committed is not
4 sufficient unless you are also convinced beyond a reasonable
5 doubt that the defendant was doing something to forward the
6 crime -- that he was a participant rather than merely a
7 knowing spectator.

8 There are, generally speaking, two types of
9 evidence from which a jury may properly find the truth as
10 to the facts of a case. One is direct evidence -- such
11 as the testimony of an eyewitness. The other is indirect
12 or circumstantial evidence, which is the proof of a chain
13 of circumstances pointing to the existence or non-
14 existence of certain facts.

15 Circumstantial evidence is the proof of facts
16 from which you may reasonably infer a material element
17 of the crime.

18 Let us take one simple example to illustrate
19 what is meant by circumstantial evidence. We will assume
20 when you entered the courthouse this morning the sun was
21 shining brightly outside, and it was a clear day. There
22 was no rain.

23 Now, let us assume that in this courtroom the
24 blinds are drawn and the drapes are drawn so you cannot
25 look outside.

A27

13 raining now.

14 That's about all there is to circumstantial
15 evidence. You may draw such inferences as reason and
16 common sense lead you to draw from facts which you find to
17 have been proven.

18 Great care must be exercised when drawing
19 inferences from circumstances proved in criminal cases,
20 and mere suspicions will not warrant a conviction. However,
21 no greater degree of certainty is required of circumstantial
22 evidence than is required of direct evidence. It is not on
23 any different or lower plane than direct evidence. The
24 law simply requires in either case you must be convinced
25 beyond a reasonable doubt of the guilt of a defendant.

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1 md 20

2 Let us assume as you are sitting in this jury
3 box, and despite the fact that it was dry when you entered
4 the building this morning, someone walks in carrying an
5 umbrella dripping water, followed in a short time by a
6 person wearing a raincoat which is wet.

7 If you are asked whether it is raining now,
8 you cannot say that you know it directly from your own
9 observation, but certainly upon the combination of facts
10 which I have stated to you even though when you entered
11 the building it was not raining outside, it would be
12 reasonable and logical for you to conclude that it is

13 raining now

1 md 21

2 In determining the guilt or innocence of a
3 defendant you must decide that question solely from the
4 evidence you have heard from the witness stand and the
5 exhibits that have been placed before you.

6 Summations of counsel which you have heard are
7 not to be considered as evidence but only as arguments to
8 you as to what counsel feel you should find from the
9 evidence.

10 In determining the issues in this case it is
11 your recollection of the testimony that is to control
12 and not that of counsel.

13 If during the course of the trial the Court

14 sustained an objection by one counsel to a question asked
15 by the examining counsel you are to disregard the question
16 and any alleged facts contained in the question, and you
17 may not speculate as to what the answer would have been.

18 If a question was asked and an answer stricken
19 from the record, you are to disregard both the question and
20 the answer in your deliberations.

21 In your search for the truth you should use
22 plain everyday common sense. You must not be governed by
23 sympathy, bias or prejudice.

24 You have seen the witnesses on the stand, and
25 observed their manner of giving testimony. How did the

429

1 md 22

2 witnesses impress you? Did they appear to be testifying
3 frankly, candidly and fairly?

4 In determining what degree of credit you should
5 give a witness' testimony you may consider his conduct,
6 his manner of testifying, and his interest in the outcome
7 of the litigation.

8 You should also consider his relationship to
9 the government, or to the defendant, his bias or im-
10 partiality, and any motive he may have to testify
11 falsely.

12 It does not necessarily follow, of course,
13 that because a person is interested in the result he is
14 incapable of telling a truthful version of an occurrence.
15 If you believe that a witness wilfully testified falsely
16 as to any material fact, you may disregard his testimony
17 altogether or you may accept that part of his testimony
18 which you believe worthy of credence.

19 What you accept or reject as credible evidence
20 is for you to determine, but you may not go outside the
21 evidence to speculate as to the facts.

22 The quality of the testimony of particular
23 witnesses, regardless of who calls them, rather than the
24 quantity of witnesses, is the test to be used in arriving
25 at your decision. There is no presumption the witnesses

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for the government are more or less truthful or credible than the witnesses for a defendant.

Evidence that a witness has been convicted of a crime may only be considered by you in assessing his credibility as a witness, and the weight that you will give to his testimony.

You should consider a witness' entire testimony -- his direct examination, his cross examination, and his redirect examination. You should consider the strength or weakness of his recollection in the light of all the testimony, and attendant circumstances in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. They may or may not be explainable. Two or more persons witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an unusual experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

It is for you to appraise the significance of any inconsistencies or contradictions in relation to the

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1 md 24

2 credibility of a witness, and in determining what the truth
3 is as to a fact in issue.

4 You have listened to tape recordings which were
5 made of telephone conversations and meetings. The use of
6 such recordings was perfectly legal and did not violate any
7 of the defendant's constitutional rights.

8 I have told you during the trial that the
9 transcripts of the conversations on tape are merely aids
10 to help you in listening to the tapes and in themselves are
11 not evidence. It is your recollection of the conversations
12 as you heard them that is to control, and this includes, of
13 course, the inflections of the voice, pauses between words,
14 and all the shadings that give meaning to the spoken word.

15 You may call for any exhibits which you desire
16 to see in conjunction with your deliberations. You may
17 call for the reading of any portion of the reporter's
18 notes of the evidence, or any portion of this charge.

19 You are instructed that the question of
20 possible punishment of a defendant in the event of conviction
21 is no concern of the jury, and should not in any sense enter into
22 your deliberations or influence your deliberations.
23 The duty of imposing sentence in the event of conviction
24 rests exclusively upon the Court. The function of the jury
25 is to weigh the evidence in the case and determine the

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md 25

guilt or innocence of a defendant solely upon the basis of such evidence.

I have sought to avoid any comments which might suggest that I had any opinion as to the guilt or innocence of a defendant. You are not to assume that I have any such views. This charge is given to you solely to instruct you as to the law applicable to the case.

The actions of the Judge during the trial in granting or denying motions, or in ruling on objections by counsel, or in statements to counsel, or in attempting to clearly set forth the law in this charge, are not to be taken by you as any indication of the determination of the issues of fact. These actions by the Court related to procedures in law. You, the members of the jury, determine the facts.

There are twelve members of this jury, and all of you must agree upon any verdict you reach as to any defendant on any count in the indictment.

This case is obviously an important one to the defendants. It is equally important to the government. I am submitting it to you in complete confidence that you will comply with your oath as jurors, and decide the case fairly and impartially and without fear or favor.

If there are any objections to the charge, I will

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1 md 26

2 take them in the robing room.

3 MR. GOULD: No, your Honor.

4 MR. AMSTERDAM: Just as to the request No. 1,
5 your Honor, which we discussed previously.

6 THE COURT: And I have ruled on that.

7 THE CLERK: Will the marshal please step
8 forward.

9 (Marshal sworn.)

10 THE COURT: At this time, Mr. Humphreys, you
11 leave us. You do not participate in deliberations, but
12 we thank you very much for having been with us, and the
13 clerk has your certificate. You can pick it up from him.

14 Do you have anything in the jury room?

15 ALTERNATE JUROR NO. 1: No, I don't.

16 THE COURT: The rest of the jury may retire to
17 the jury room.

18 (Jury retired.)

19 (In open court; jury not present.)

20 MR. GOULD: Your Honor, may I place something
21 on the record?

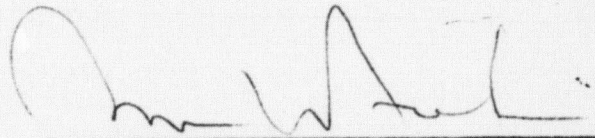
22 THE COURT: Yes.

23 MR. GOULD: As to the defendant's contention
24 that Exhibits 24 and 25 are not in evidence, may I give
25 the Court the best of my recollection?

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CERTIFICATE OF SERVICE

I hereby certify that I have this day deposited in the U.S. mails, postage prepaid, two (2) copies of Appellant's Brief and Appendix in United States v. Glover, addressed to the United States Attorney, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007



MARK LEMLE AMSTERDAM

Dated: New York, New York
January 18, 1978

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